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IN THE

Supreme Court of the United States

October Term, 1967.

No. 621

In the Matter of FERRO CONTRACTING CO., INC.,
Bankrupt.

LIVINGSTON NATIONAL BANK,
Appellant,

vs.

CARL F. BARBATO, as Trustee in Bankruptcy of Ferro Contracting Co., Inc., Bankrupt,
Appellee.

PETITION OF CARL F. BARBATO, AS TRUSTEE, ETC., FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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OCTOBER TERM, 1967.

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FERRO CONTRACTING CO., INC.,
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LIVINGSTON NATIONAL BANK,
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CARL F. BARBATO, as Trustee in Bankruptcy of Ferro Contracting Co., Inc., Bankrupt,
Appellee.

(Italics supplied unless otherwise noted.)

PETITION OF CARL F. BARBATO, AS TRUSTEE, ETC., FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Carl F. Barbato, as Trustee in Bankruptcy of Ferro Contracting Co., Inc., Bankrupt (hereinafter referred to as "Trustee") prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit, entered in the above cause on June 19, 1967.

OPINIONS BELOW.

The opinion of the Court of Appeals, on which it entered its judgment of the same date with respect to which petitioner (appellee below) seeks certiorari, was filed on June 19, 1967. The opinion has not as yet been reported in the Official Reports, and is printed in the appendix at A-9. The judgment is printed at A-17.

The opinion of the District Court for the District of New Jersey is reported at 256 Fed. Supp. 89 and is found in the appendix *below* at page 164a.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was made and entered on June 19, 1967. A Petition for Rehearing was filed on June 29, 1967 by said Trustee. Said Petition was denied on July 24, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1), and 11 U. S. C. 47(c).

QUESTIONS PRESENTED.

1. Did the Court of Appeals err in determining that appellant bank had a valid lien to the extent of $18,842.15 under the applicable provisions of the New Jersey statutes?

2. Did the Court of Appeals err in reversing the District Court which held that the lien of said appellant bank was null and void for failure to file the same in accordance with the applicable provisions of the New Jersey statutes?

STATUTES INVOLVED.

The following statutes are involved herein, the pertinent portions of which are printed in the appendix at A-1 to A-8:

Laws of 1964, Sec. 3, Ch. 238; N. J. S. A. 39:10-2;
N. J. S. A. 39:10-11c;
N. J. S. A. 39:10-11j;
N. J. S. A. 39:10-3.

STATEMENT OF FACTS.

The facts are succinctly set forth in the opinion of the Court of Appeals as follows (A-10):

> "This appeal requires the resolution under New Jersey law of competing claims to the proceeds from the sale of certain assets of the bankrupt Ferro Contracting Co., Inc. The referee held that the assets in question were pieces of construction equipment and that therefore the Livingston National Bank (appellant herein) had secured a valid lien thereon by filing on June 19, 1963 a financing statement with the Secretary of State pursuant to the New Jersey Uniform Commercial Code, 12A N. J. S. A. 9-401(1)(c). The district court reversed, holding in favor of the trustee (appellee herein) that the assets were motor vehicles and that therefore the bank's lien was invalid because no certificate of ownership or statement of encumbrance had been filed with the county clerk or with the Director of Motor Vehicles pursuant to the New Jersey Motor Vehicle Certificate of Ownership Law, 39 N. J. S. A. 10-11C.

> "The assets in dispute consisted of the following five items: a Michigan front end loader, three crawler tractor bulldozers, and a backhoe. These items were used by the bankrupt company in its construction business. It is agreed that the bank's lien in the amount of $17,577.15 is valid unless these assets are considered to be motor vehicles. *Consequently, the controlling issue is whether the five items fall within the category of 'motor vehicles' as used in the Certificate of Ownership Law.*"

Following the filing of the opinion, the Trustee-appellee submitted a Petition for Rehearing in which he pointed out that the statement of the sponsors attached to Assembly Bill 643 (which resulted in the 1964 amendment referred to in the Court's opinion at page 4—Laws of 1964, Sec. 3, Ch. 238, approved December 23, 1964; N. J. S. A. 39:10-2) disclosed that until the adoption of the amendment, the Director of Motor Vehicles had absolutely no power to exempt so-called "non-conventional" motor vehicles involved herein. Under the circumstances, the Trustee contended that the Court's determination was patently erroneous since the legislative intent was so clearly spelled out in the statement attached to t' e amendment.

The proofs before the Referee in Bankruptcy also disclosed that a certificate of ownership under the New Jersey statute was in fact issued for one of the motor vehicles involved herein (the 1957 Michigan front end loader). In the Petition for Rehearing the Trustee requested the Court of Appeals to determine that, at least with respect to this motor vehicle, the lien was invalid for failure to note the encumbrance on the certificate of ownership as required by the New Jersey statute (N. J. S. A. 39:10-11c; 11j). As noted, the Court of Appeals denied the Petition for Rehearing with respect to both matters.

REASONS FOR GRANTING THE WRIT.

1. The Court of Appeals has decided an important question of New Jersey law in such a way as to conflict with the applicable law of said state (Rule 19-1(b)).

The Trustee in Bankruptcy is an "officer" of the Bankruptcy Court (11 U. S. C. A. Sec. 1 (22)). Under said Act, the Trustee is charged with the duty of avoiding any "avoidable" obligations of the bankrupt estate (11 U. S. C. A. Sec. 110e(1)). The Trustee, of course, is a fiduciary for all of the creditors of the bankrupt estate. Accordingly, it is the Trustee's duty and obligation to bring to this Court's attention a determination by the Court of Appeals which is so patently erroneous on its face, that this Court should exercise its power of review and supervision (11 U. S. C. A. 47(c)).

The New Jersey Certificate of Ownership Law was adopted to overcome an evil which then existed with respect to the sale, purchase or other disposition of motor vehicles. We quote:

> "39:10-3. Interpretation of chapter
>
> This chapter shall be so interpreted and construed as to effectuate its general purpose to regulate and control titles to, and possession of, *all* motor vehicles in this state, so as to prevent the sale, purchase, disposal, possession, use or operation of stolen motor vehicles, or motor vehicles with fraudulent titles, within this state."

In interpreting the statute, the Supreme Court of New Jersey stated as follows:

> "(4) In summary, the statutory purpose is clearly designed and intended to be an *exclusive* method of regulation of title and evidence of ownership of motor

vehicles to prevent fraud and theft of motor vehicles in this state. In this respect it is an enactment intended as an exercise of the police power of this state. Cf. A Comparison of Land and Motor Vehicle Registration, 48 Yale L. J. 1238, 1247, 1249-1250 (1939)," (*National City Bank of New York v. Del Sordo,* 16 N. J. 530, 109 A. 2d 631 (1954), at pages 636-637.)

The amendment to the New Jersey statute (which excluded, *for the first time,* non-conventional motor vehicles) became effective as of January 23, 1965. It follows, therefore, that the effect of the decision of the Court of Appeals in the case at bar is to validate every lien affecting so-called non-conventional type motor vehicles, given prior to said date, even though there was no compliance with the Certificate of Ownership Law by (1) obtaining a certificate of ownership for the motor vehicle, and (2) noting the encumbrance on the said certificate. The number and extent of the non-conventional motor vehicles in use in the State of New Jersey prior to January 23, 1965 is difficult to ascertain. However, it is reasonably estimated that there were at least 25,000 such non-conventional motor vehicles in use as of said date—and it may be assumed that in practically all instances the same were subject to liens. (Automotive News, April 24, 1967 issue.)

In its opinion, the Court of Appeals stated that:

"Both the referee and the district court noted that after the present controversy arose the Certificate of Ownership Law was amended to exclude from its coverage every 'non-conventional type motor vehicle' such as is here involved. The district court concluded that this amendment provides 'some indication that the subject chattels would have been more specifically included originally within the definition of "motor vehicle" had the legislature foreseen the type question

which exists in this case.' *However, we think it can be argued here with equal force that the recent amendment did no more than make clear the pre-existing legislative intent as to the scope of the Law.*[8] (Footnote 8: The testimony of the chief of the Certificate of Ownership Bureau indicated that there had been considerable administrative confusion as to the coverage of the term 'motor vehicle.' Considering this confusion we attach no particular significance to the fact noted by the court below that a certificate of ownership had been issued for the Michigan front end loader.)"

It is clear from the foregoing that the Court of Appeals determined that the New Jersey Legislature had intended, *in the original Act before the amendment,* to exclude non-conventional motor vehicles. An examination of the statement attached to Assembly Bill 643 indicates exactly the *contrary* intention. The statement may be found in the appendix at A-5-A-6. It is obvious from said statement that:

1) The Division of Motor Vehicles "would no longer issue" certificates of ownership "for such non-conventional type motor vehicles."

2) Such vehicles would be registered "without further proof of ownership."

3) These changes would bring New Jersey into "conformance with the practices of the great majority of other states."

4) Under the amendment a "security interest in such non-conventional type motor vehicles" would be perfected

by filing a financial (sic) statement under the Uniform Commercial Code and "need not be recorded with the Division of Motor Vehicles."

5) Under the amendment the Division (of Motor Vehicles) would be required to record security interests of vehicles which are "normally used over the highways."

6) This change would "effect considerable administrative improvements for the Division and for financial institutions."

7) Under the amendment dealers in non-conventional type motor vehicles would no longer require a license as "motor vehicle" dealers.

Furthermore, under the amendment, the Director of Motor Vehicles, *for the first time,* was given the legislative authority to except from the operation of the statute "non-conventional" motor vehicles. We quote:

> "The Director of the Division of Motor Vehicles shall have power to make, amend and repeal regulations, not inconsistent with the provisions of this paragraph, *prescribing what further vehicles or types of vehicles, not specified in this paragraph, shall be included in the category of nonconventional type motor vehicles.*"
>
> (N. J. S. A. 39:10-2 as Am. L. 1964, c. 238, par. 1; L. 1964, c. 10, par. 1.)

In order to arrive at its determination that the motor vehicles in issue fall within the category of "motor vehicles", as used in the Certificate of Ownership Law, the Court of Appeals looked only to the several applicable statutes in effect *prior* to the foregoing amendment. Since the amendment and the statement annexed thereto so clearly

and unequivocally indicate that the existing statutes, prior to the amendment, *did not* exclude non-conventional motor vehicles, the Court's failure to consider the amendment as an aid to construction was plain error.

The New Jersey Supreme Court, in the leading case of *Howard Savings Institution v. Kielb*, 38 N. J. 186, 183 A. 2d 401 (1962), in speaking of a statement attached to a legislative bill, enunciated the following rule:

> "If clarification or amplification of legislative purpose is deemed necessary, the statements appended to the bills before passage furnish ample evidence of that intent as well as of the circumstances which occasioned the statutes." (183 A. 2d at page 405.)

It is evident from all of the foregoing that it was the intent of the Legislature to *change* the law, and the powers of the Director, as it existed prior to the adoption of the amendment. The very *title* of the amendment demonstrates this fact. We quote:

> "TITLE. AN ACT *excluding* certain vehicles from the Motor Vehicle Certificate of Ownership Law and amending sections 29:10-2 and 39:10-7 of the Revised Statutes" (A-5).

It is also clear from the foregoing that until the amendment was adopted, the Director was obligated by law to issue certificates of ownership for *every* type of "motor vehicle"—"conventional" or "non-conventional".

2. The issuance of a certificate of ownership for the 1957 Michigan front end loader resulted in the mandatory duty on the part of appellant bank to note its encumbrance on the certificate pursuant to the direction of N. J. S. A. 39:10-11c.

As we indicated hereinabove, a certificate of ownership was actually issued by the Division of Motor Vehicles for the 1957 Michigan front end loader (see Exhibit C-11 attached to the Petition for Rehearing). The Uniform Commercial Code (which took effect as of January 1, 1963 in New Jersey) provides as follows:

> "(3) The filing provisions of this Chapter do not apply to a security interest in property subject to a statute . . .
>
> "(b) of this state which provides for central filing of, *or which requires indication on a certificate of title of*, such security interests in such property." (N. J. S. A. 12A:9-302(3).)

The record of the proceedings indicates that the said motor vehicle realized at the public sale of the assets the sum of $7,250.00. Hence, if the Trustee's position is correct, the lien claim of the bank should be reduced by at least that amount, as well as the pro rata share of the costs and expenses which appear in the record. In its opinion (footnote 8, page 4), the Court of Appeals stated:

> "Considering this confusion we attach no particular significance to the fact noted by the Court below that a certificate of ownership had been issued for the Michigan front end loader."

As we have already indicated hereinabove, the Director

had absolutely no power to exempt the motor vehicles in issue from the provisions of the statute. However, the Director admittedly issued a certificate of ownership for the 1957 Michigan front end loader. Accordingly, we submit, that whether the certificate was issued in error, or as a result of confusion on the part of the Bureau, the bank was absolutely obligated to note its encumbrance upon the certificate pursuant to the mandate of the statute. Admittedly, it failed to do so. Hence, the Court of Appeals should have, at the very least, declared the bank's lien null and void as against this specific motor vehicle. Having failed to do so, we submit, the Court fell into error.

3. The decision of the New Jersey Supreme Court in the Ferrante and National State Bank cases decided on July 5, 1967 are not applicable to the issue herein.

In reply to the Petition for Rehearing filed below by the Trustee herein, the bank cited two cases decided by the New Jersey Supreme Court after the filing of the opinion by the Court of Appeals. The cases are set forth in full in the "Reply to Petition for Rehearing" in the certified record of the Clerk. An examination of both cases will indicate that the New Jersey Supreme Court confined its determination in both cases to the definition of a "motor vehicle" within the contemplation of the Garage Keeper's and Automobile Repairmen Lien Act of New Jersey (N. J. S. A. 2A:44-21). Furthermore, it was stipulated in open Court at the argument before the Court of Appeals by both counsel that the determination of the foregoing cases by the New Jersey Supreme Court would not affect the determination of the issues herein. An examination of both cases will clearly indicate that the Supreme Court of New Jersey decided in each case that the successful party had a

common law artisan's lien, and hence superior to the security instruments involved therein.

It will also be noted that there was no definition of a "motor vehicle" under the Garage Keepers' Lien Act. Hence, the New Jersey Supreme Court, in aid of its determination, examined the provisions of the Motor Vehicle Act to ascertain the legislative intent as to a definition of a "motor vehicle." It is apparent from both opinions that the New Jersey Supreme Court failed to give proper effect to the statement attached to the amendment as indicated hereinabove.[1]

Regardless of that fact, the Court's definition of a "motor vehicle" is *dictum* in view of its final determination. Accordingly, there is still no definitive construction by the New Jersey Courts as to the meaning of the term "motor vehicle" under the Certificate of Ownership Law involved herein.

CONCLUSION.

For all of the foregoing reasons, we respectfully submit that this petition should be granted.

Respectfully submitted,

ALLAN L. TUMARKIN,
Attorney for Petitioner.

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[1] The New Jersey Supreme Court also relied on the decision of the Court of Appeals in the case at bar—which, of course, we contend was erroneous. (Reply to Petition for Rehearing, page 3.)

APPENDIX.

ASSEMBLY BILL 643.

L. 1964, Chapter 238 R. S. Cum. Supp. 39:10-2 et seq.
Revised Statutes Cumulative Supplement

(Approved Dec. 23, 1964, Effective Jan. 22, 1964.)

39:10-2. *Definitions.* As used in this chapter unless other meaning is clearly apparent from the language or context, or unless inconsistent with the manifest intention of the legislature:

"New motor vehicle" means only a newly manufactured motor vehicle, except a nonconventional type motor vehicle, and includes all such vehicles propelled otherwise than by muscular power, and motorcycles, trailers and tractors, excepting such vehicles as run only upon rails or tracks.

"Used motor vehicle" means every motor vehicle, except a nonconventional type motor vehicle, title to, or possession of, which has been transferred from the person who first acquired it from the manufacturer or dealer, and so used as to become what is commonly known as "secondhand" within the ordinary meaning thereof, and includes every motor vehicle other than a "new motor vehicle" or a "nonconventional type motor vehicle."

"Any motor vehicle," "every motor vehicle," or similar term, means both new and used motor vehicles, except a "nonconventional type motor vehicle."

"Nonconventional type motor vehicle" means every vehicle not designed or used primarily for the transportation of persons or property and only incidentally operated or moved over a highway, including, but not limited to ditch-digging apparatus, well-boring apparatus, road and general purpose construction and maintenance machinery,

asphalt spreaders, bituminous mixers, bucket loaders, ditchers, leveling graders, finishing machines, motor graders, road rollers, scarifiers, earth-moving carryalls, scrapers, power shovels, drag lines, self-propelled cranes, earth-moving equipment, trailers and semitrailers which weigh less than 2,500 pounds, except that no mobile home or travel trailer shall be classified as a nonconventional type motor vehicle, motorized wheel chairs, motorized lawn mowers, bogies, farm equipment, whether or not motorized, including farm tractors, industrial tractors, motor bicycles, scooters, go-garts, gas buggies and golf carts. The director of the division of motor vehicles shall have power to make, amend and repeal regulations, not inconsistent with the provisions of this paragraph, prescribing that further vehicles or types of vehicles, not specified in this paragraph, shall be included in the category of nonconventional type motor vehicles.

"Motor vehicles which constitute inventory held sale" means new motor vehicles and used motor vehicles held for the purpose of sale by dealers and used motor vehicles held for the purpose of sale by used motor vehicle dealers, and excludes motor vehicles held for the purpose of lease or rental by a person engaged in the motor vehicle leasing or rental business.

"Manufacturer's or importer's certificate of origin" means the original written instrument or document required to be executed and delivered by the manufacturer to his agent or a dealer, or a person purchasing direct from the manufacturer, certifying the origin of the vehicle.

"Certificate of ownership" means the document issued in conformance with this chapter, certifying ownership of a motor vehicle, other than manufacturer's or importer's certificate of origin.

"Assignment" means the execution of a prescribed form transferring ownership of a motor vehicle from the person named therein to the purchaser.

"Contract" means conditional sale agreement, bailment, lease, chattel mortgage, trust receipt or any other form of security or possession agreement executed prior to January 1, 1963, wherein and whereby possession of a motor vehicle is delivered to the buyer and title therein is to vest in the buyer at a subsequent time upon the payment of part or all of the price, or upon the performance of any other condition or happening of any contingency, or upon the payment of a sum substantially equivalent to the value of the motor vehicle, by which contract it is agreed that the buyer is bound to become, or has the option of becoming the owner of the motor vehicle upon full compliance with the terms of the contract.

"Abstract" means the duplicate copy of the original certificate of ownership recording any encumbrance or upon which the existence of a security interest is noted.

"Title papers" means any instrument or document that is evidence of ownership of a vehicle.

"Director" means the director of motor vehicles, his deputy or duly authorized agent.

"Manufacturer" means the person who originally manufactured the motor vehicle.

"Dealer" means the agent, distributor or authorized dealer of the manufacturer of the new motor vehicle and who has an established place of business.

"Used motor vehicle dealer" means a person engaged in the business of selling, buying or dealing in used motor vehicles, and who has an established place of business.

"Person" includes natural persons, firms or copartnerships, corporations, associations, or other artificial bodies, receivers, trustees, common law or statutory assignees, executors, administrators, sheriffs, constables, marshals, or other persons in representative or official capacity, and members, officers, agents, employees, or other representatives of those hereinbefore enumerated.

"Buyer" includes purchaser, debtor, lessee, bailee, transferee, and any person buying, attempting to buy, or receiving a motor vehicle, subject to a security interest, lease, bailment or transfer agreement, and their legal successors in interest.

"Seller" means manufacturer, dealer, lessor, bailor, transferor with or without a security interest, and any other person selling, attempting to sell, or delivering a motor vehicle, and their legal successors in interest.

The terms "sell" or "sale" or "purchase" and any form thereof include absolute or voluntary sales and purchases, agreements to sell and purchase, bailments, leases, security agreements whereby any motor vehicles are sold and purchased, or agreed to be sold and purchased, involuntary, statutory and judicial sales, inheritance, devise or bequest, gift or any other form or manner of sale or agreement of sale thereof, or the giving or transferring possession of a motor vehicle to a person for a permanent use; continued possession for 60 days or more is to be construed as permanent use.

"Manufacturer's number" means the original manufacturer's vehicle identification number die stamped upon the body, or frame or either or both of them, of a motor vehicle or the original manufacturer's number die stamped upon, the engine or motor of a motor vehicle.

"Purchaser" means a person who takes possession of a motor vehicle by transfer of ownership, either for use or resale, except a dealer when he takes possession through a certificate of origin.

"Debtor" means the person who owes payment or other performance of the obligation secured by a security interest in a motor vehicle.

"Security interest" means an interest in a motor vehicle which secures payment or other performance of an obligation.

"Security agreement" means an agreement which creates or provides for a security interest in a motor vehicle.

"Secured party" means a lender, seller or other person in whose favor there is a security interest.

Source. L. 1964, c. 238, §1. Approved Dec. 23, 1964, effective Jan. 22, 1965.

Note. This section was amended previously by: L. 1946, c. 136, §2; L. 1949, c. 235, §1; and by L. 1961, c. 122, §1, approved Nov. 30, 1961, effective Jan. 1, 1963. *Italic* face type has not been used to indicate changes.

39:10-7. *Manufacturer's vehicle identification number required on motor vehicles.* Every motor vehicle *and non-conventional type motor vehicle* shall have and contain a manufacturer's *vehicle identification number,* which number shall not be obliterated, erased, mutilated, removed or missing. This section shall not affect those persons authorized by law to have in their possession a motor vehicle on which the manufacturer's *number or* numbers have been obliterated, erased, mutilated, removed or missing.

Source. L. 1964, c. 238, §2. Approved Dec. 23, 1964, effective Jan. 22, 1965.

Note. This section was amended previously by L. 1949, c. 235, §2, approved May 24, 1949, effective July 4, 1949.

TITLE.

AN ACT excluding certain vehicles from the Motor Vehicle Certificate of Ownership Law and amending sections 39:10-2 and 39:10-7 of the Revised Statutes.

STATEMENT.

This bill would amend the definitional section of the Motor Vehicle Certificate of Ownership Law to exempt

"nonconventional type motor vehicles." Under its provisions, the Division of Motor Vehicles would no longer issue certificates of ownership nor require manufacturer's certificates of origin for such nonconventional type motor vehicles. Such vehicles would be registered upon proper application, without further proof of ownership. These changes would bring New Jersey into conformance with the practices of the great majority of other States.

Under this legislation a security interest in such nonconventional type motor vehicles would be perfected by filing a financial statement pursuant to the terms of the uniform commercial code and need not be recorded with the Division of Motor Vehicles. Thus, the division would only be responsible for recording security interests of vehicles which are normally used over the highways. This change would in this way, effect considerable administrative improvements for the division and for financial institutions.

Under section 19, chapter 10 of Title 39 of the Revised Statutes, dealers in such nonconventional type motor vehicles are considered "motor vehicle" dealers and must be licensed and pay a $100.00 license fee and $75.00 for dealer plates each year, the same as automobile dealers. This is an especially burdensome requirement for many of these dealers, such as boat and marine businesses which only incidentally sell a few small boat or recreational or utility trailers each year, but who must, nevertheless, be licensed as "motor vehicle" dealers and pay the annual fees. This legislation excludes such dealers from these licensing requirements and fees.

N. J. S. A. 39:10-11. Submitting evidence of purchase; recording; certificate of ownership; fee; creation of security interest; penalty.

C. Except as hereinafter in this section otherwise expressly provided, whenever a security interest is created in a motor vehicle, other than a security interest which is required to be noted on the certificate of origin or the certificate of ownership as provided in sections 39:10-8 and 39:10-9 of this Title, there shall be filed with the director, the certificate of ownership of the motor vehicle, together with a financing statement on a form prescribed by the director. The director shall make and file a record of the transaction and shall issue a certificate of ownership recording the name and address of the secured party or his assignee thereon, and shall deliver it to the secured party or his assignee. A copy of the certificate of ownership so issued shall be delivered to the buyer. The director shall collect a fee of $2.00 for his services in issuing a certificate and copy thereof and for making a record of and filing the record of the transaction pursuant to this subsection.

J. The notation of the name and business or residence address of a secured party or his asignee, on the certificate of origin or on the certificate of ownership, as provided in sections 39:10-8 and 39:10-9 of this Title, and the presentation to the director in accordance with section 39:10-11 of this Title, of the certificate of origin or certificate of ownership so noted, and the compliance with the requirements of subsections C and D of Section 39:10-11 of this Title, shall be in lieu of all filing requirements imposed by Chapter 9 of Title 12A of the New Jersey Statutes and shall constitute the perfection of a security interest in the motor vehicle, and the rights and remedies of the debtors and the

secured parties in respect to such security interest shall, except as otherwise expressly provided in this chapter, be subject to and governed by chapter 9 of Title 12A of the New Jersey Statutes. As amended L. 1961, c. 122, p. 737 §5; L. 1962, c. 193, §3; L. 1963, c. 34, §3.

39:10-3. Interpretation of chapter

See page 5 of petition, supra.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 16167.

IN THE MATTER OF
FERRO CONTRACTING CO., INC., Bankrupt.

LIVINGSTON NATIONAL BANK,
Appellant.

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Argued March 30, 1967.

Before: KALODNER and SEITZ, Circuit Judges,
and BODY, District Judge.

OPINION OF THE COURT.

(Filed June 19, 1967.)

By SEITZ, Circuit Judge.

This appeal requires the resolution under New Jersey law of competing claims to the proceeds from the sale of certain assets of the bankrupt Ferro Contracting Co., Inc. The referee held that the assets in question were pieces of construction equipment and that therefore the Livingston National Bank (appellant herein) had secured a valid lien thereon by filing on June 19, 1963 a financing statement with the Secretary of State pursuant to the New Jersey Uniform Commercial Code, 12A N. J. S. A. 9-401 (1) (c). The district court reversed, holding in favor of the trustee (appellee herein) that the assets were motor vehicles and that therefore the bank's lien was invalid because no certificate of ownership or statement of encumbrance had been filed with the county clerk or with the Director of Motor Vehicles pursuant to the New Jersey Motor Vehicle Certificate of Ownership Law, 39 N. J. S. A. 10-11C.[1]

The assets in dispute consisted of the following five items: a Michigan front end loader, three crawler tractor bulldozers, and a back hoe. These items were used by the bankrupt company in its construction business. It is agreed that the bank's lien in the amount of $17,577.15 is valid unless these assets are considered to be motor vehi-

[1] It is clear from 12A N. J. S. A. 9-302 that if the Certificate of Ownership Law is applicable to the assets involved in this case its provisions and not those of the Uniform Commercial Code govern the proper place of filing.

cles.[2] Consequently, the controlling issue is whether the five items fall within the category of "motor vehicles" as used in the Certificate of Ownership Law.

There are apparently no New Jersey cases in which it was necessary to decide whether construction machinery is included within the meaning of "motor vehicle" as used in the Certificate of Ownership Law. Nor is there a consistent pattern in other areas of New Jersey law. For example, in National State Bank v. Rapp, 90 N. J. Super. 300, 217 A. 2d 325 (1966), certif. granted, 47 N. J. 91, 219 A. 2d 425 (1966), "motor vehicle" as used in the Garage Keepers and Automobile Repairmen's Act, 2A N. J. S. A. 44-20, et seq., was held to include a bulldozer similar to the ones involved in the present case. In contrast, Bogota v. Brewster Equip. Co., 83 N. J. Super. 586, 200 A. 2d 629 (1964), seems to indicate that "motor vehicle" as used in 39 N. J. S. A. subtitle 1 does not include construction equipment, at least for personal property taxation purposes.

While there is thus no decisive New Jersey case law, a fairly specific statutory definition of "motor vehicle" can be found in title 39 which covers motor vehicles and traffic regulation generally. The Certificate of Ownership Law, chapter 10 in subtitle 2 of title 39, does not itself contain a definition of "motor vehicle". However, chapter 10 does include a definition of "new motor vehicle"[3] which closely parallels the definition of "motor vehicle"[4] in sub-

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[2] The trustee did not challenge in the district court, nor does he challenge here, the referee's ruling that the security transaction was not violative of 14 N. J. S. A. 14-2 which prohibits transfers of assets in contemplation of insolvency.

[3] "New motor vehicle" means only a newly manufactured motor vehicle, and includes all such vehicles propelled otherwise than by muscular power, and motor cycles, trailers and tractors, excepting such vehicles as run only upon rails or tracks." 39 N. J. S. A. 10-2.

[4] " 'Motor vehicle' includes all vehicles propelled otherwise than by muscular power, excepting such vehicles as run only upon rails or tracks." 39 N. J. S. A. 1-1.

title 1. Subtitle 1 also contains a definition of "vehicle".[5] From these sources the following definition emerges: As used in the Certificate of Ownership Law, "motor vehicle" means every device in, upon or by which a person or property is or may be transported upon a highway, excepting all vehicles propelled by muscular power or used only upon rails or tracks.

It is obvious that the five assets here involved do not fall within the exception of "vehicles propelled by muscular power."[6] As for the affirmative part of the definition of "motor vehicle", the lower court concluded that the assets in issue are devices "in, upon or by which a person or property is or may be transported upon a highway" because they "of necessity require the presence of a person aboard to operate" them and are "required to be licensed."

This conclusion of the district court is best analyzed in the light of the purposes of the Certificate of Ownership Law. The Supreme Court of New Jersey in National City Bank of New York v. Del Sordo, 16 N. J. 530, 109 A. 2d 631 (1954), discussed this law at length. Citing the provision which indicates how the Law is to be interpreted,[7] the

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[5] "'Vehicle' means every device in, upon or by which a person or property is or may be transported upon a highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks." 39 N. J. S. A. 1-1. In the court below counsel for the trustee argued that this definition of "vehicle" should not be considered. However, he does not appear to advance this argument in his brief in this Court. In any event, the meaning of "vehicle" must be taken into account because the definition of "motor vehicle" refers explicitly to "vehicles."

[6] At the proceedings before the referee the chief of the Certificate of Ownership Bureau suggested that Caterpillar treads are "tracks" within the meaning of the exception of vehicles "used only upon rails or tracks." We find it necessary here only to point out that the definition of "vehicle" refers to "stationary" rails or tracks.

[7] "This chapter shall be so interpreted and construed as to effectuate its general purpose to regulate and control titles to, and possession of, all motor vehicles in this state, so as to prevent the sale, purchase,

Court concluded that consideration should be given "to the freedom of movement of and transfer of title to automobiles and the considerable volume of credit transactions associated therewith, as well as the motive to reduce thefts and to prevent frauds perpetrated upon individuals and finance companies in this connection." 109 A. 2d 631, 639. These policy considerations seem to have little application to construction equipment. We therefore believe that the definition of "motor vehicle" was not intended to embrace machinery which normally operates at construction sites even though literally it perhaps can be used to transport persons on a highway.

Both the referee and the district court noted that after the present controversy arose the Certificate of Ownership Law was amended to exclude from its coverage every "non-conventional type motor vehicle" such as is here involved. The district court concluded that this amendment provides "some indication that the subject chattels would have been more specifically included originally within the definition of 'motor vehicle' had the legislature foreseen the type question which exists in this case." However, we think it can be argued here with equal force that the recent amendment did no more than make clear the pre-existing legislative intent as to the scope of the Law.[8]

Accordingly, we conclude that the bank's lien was not subject to the filing requirements of the Certificate of Ownership Law and is therefore valid. In view of our

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disposal, possession, use or operation of stolen motor vehicles, or motor vehicles with fraudulent titles, within this State." 39 N. J. S. A. 10-3.

[8] The testimony of the chief of the Certificate of Ownership Bureau indicated that there had been considerable administrative confusion as to the coverage of the term "motor vehicle." Considering this confusion we attach no particular significance to the fact noted by the court below that a certificate of ownership had been issued for the Michigan front end loader.

conclusion we find it unnecessary to discuss other issues raised by the parties, including whether any weight should be given to the administrative interpretation which the chief of the Certificate of Ownership Bureau placed upon the term "motor vehicle".

One other matter requires our attention. The district court reversed the referee's award in the bank's favor of $250 for reasonable expenses incurred in picking up, servicing, and storing the construction equipment and of $1,015.00 for reasonable counsel fees. The district court stated that these expenses were not allowable because incurred after the bankruptcy petition had been filed on September 10, 1964. The trustee in its brief filed with us has urged that, in the event the bank's lien is upheld, "the extent and value of the services and expenses should be fixed and determined by the District Court, on remand." Having indicated in this opinion that the bank's lien is in fact valid, we must decide whether such a remand is required.

In the proceedings before the referee three affidavits were filed which described the collection services rendered for the bank. The trustee apparently made no challenge to the accuracy of these affidavits. We think that the determination of the extent and value of the services was properly for the referee in the first instance and that in the circumstances of this case we are in a position to review the referee's award without further proceedings in the court below. We thus see no necessity for a remand to the district court on this point and proceed to analyze whether the referee's allowance of collection expenses should be reinstated.

We note preliminarily that the referee's award had a contractual basis. The promissory note and chattel mortgage which were executed by the company specifically provided that the bank could recover expenses of collection including reasonable attorney's fees. However, a problem

remains as to the effect of the debtor's subsequent bankruptcy.

With respect to non-legal expenses, the referee limited his allowance to charges incurred before bankruptcy. Apparently the referee's conclusion was based on the proposition that the trustee obtains control of a bankrupt's property at the date the petition is filed and thereafter acts on behalf of all creditors. But we need not indulge in speculation because the bank has not challenged the referee's denial of post-bankruptcy collection expenses and the trustee has not denied the bank's right to reasonable pre-bankruptcy expenses. The trustee's only contention seems to be that the evidence of pre-bankruptcy services does not sustain the referee's award.

The bankruptcy petition was filed on September 10, 1964. On September 7th the bank hired William F. Hegarty, Inc. to pick up the equipment. On that day Hegarty examined the five pieces of construction machinery. On September 9th Hegarty picked up one bulldozer. He took possession of the other equipment after bankruptcy. The bank paid Hegarty $475.00 for its services. The referee allowed only $150.00. This sum does not appear to us to be an unreasonable estimate of the value of Hegarty's pre-bankruptcy services. On September 1st the bank also had hired Sanford Bierman to be bailiff in the chattel mortgage foreclosure proceedings. He obtained a Certificate of Search on September 8th and on September 9th contacted Hegarty. After bankruptcy he performed other tasks. For all of his services the bank paid Bierman $323.82. The referee allowed only $100.00. Again, in our view the referee's estimate of the value of pre-bankruptcy services was not unreasonable. Thus, we do not think that the referee's award of $250.00 for non-legal collection expenses incurred prior to the filing of the bankruptcy petition was improper.

As for the bank's request of $3,000 for legal services and $133.54 for legal disbursements, the referee allowed $1,015.00. In our review of this allowance for reasonable legal fees incurred in the collection process it is not necessary to determine whether these services were rendered prior to bankruptcy. This is so because no matter when or how rendered, such fees if reasonable and if permitted by local law are assertable according to the contractual stipulation of the parties. Security Mortgage Co. v. Powers, 278 U. S. 149 (1928). We think the referee in making his award of attorney's fees correctly followed the reasoning of In re Pack-it, Inc., 158 F. Supp. 148 (D. N. J. 1958). And the amount of the award is certainly not unreasonable.

The order of the district court will be reversed and judgment entered against the trustee in the bank's favor in the amount fixed by the referee at $18,842.15 to be paid from the proceeds of the sale of the five pieces of construction equipment.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

JUDGMENT OF COURT OF APPEALS.

Filed June 19, 1967.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the District Court, filed July 27, 1966, be, and the same is hereby reversed, with costs, with the direction to enter judgment against the trustee in the bank's favor in the amount fixed by the referee at $18,842.15 to be paid from the proceeds of the sale of the five pieces of construction equipment.

ATTEST:

THOMAS F. QUINN,
Clerk.

June 19, 1967.

SUPREME COURT, U. S.

FILED

OCT 4 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 621

IN THE MATTER OF

FERRO CONTRACTING CO., INC.,

Bankrupt.

CARL F. BARBATO, as Trustee in Bankruptcy of FERRO CONTRACTING CO., INC., Bankrupt,

Petitioner,

vs.

LIVINGSTON NATIONAL BANK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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Statement of Facts

On June 19, 1963, Ferro Contracting Co., Inc. (hereinafter referred to as the Bankrupt), a New Jersey corporation, borrowed $32,325.00 from the Livingston National Bank (hereinafter referred to as the Bank). As security for the loan, the President of the Bankrupt executed a chattel mortgage-security agreement on five pieces of construction equipment owned by the Bankrupt. This agreement covered a Michigan front end loader, three crawler tractor bulldozers and a backhoe. The Bank filed a Financing Statement with the Secretary of State of New Jersey pursuant to the provisions of the Uniform Commercial Code, N.J.S.A. 12A:9-401.

The Bankrupt filed its petition for Bankruptcy on September 10, 1964; on November 5, 1964 public sale was held and the equipment was sold subject to proof by the Bank of its lien on the equipment. The Trustee challenged the validity of the Bank's lien on the ground, *inter alia*, that the lien was invalid because the equipment were "motor vehicles" within the meaning of N.J.S.A. 39:1-1 *et seq.* and the Bank failed to perfect its lien in accordance with the requirements of N.J.S.A. 39:10-11 C as required for motor vehicles in said Act.

The Referee found that the items involved were not "vehicles" within the meaning of the Motor Vehicle Act of the State of New Jersey, N.J.S.A. 39:1-1 *et seq.* but were pieces of construction equipment or chattels, and therefore, the Bank's lien was properly perfected by filing with the office of the Secretary of State in accordance with the provisions of the Uniform Commercial Code, N.J.S.A. 12A:9-401 (1)(c).

The District Court, on Petition for Review, held that the items were "motor vehicles" within the meaning of the New Jersey Motor Vehicle Act and that the Bank had not

perfected its lien because it failed to file the Financing Statement with the Director of Motor Vehicles in accordance with the provisions of N.J.S.A. 39:10-11 C.

The Court of Appeals for the Third Circuit reversed the District Court, holding that the equipment involved did not fall within the definition of "motor vehicle" as used in the Certificate of Ownership Law, N.J.S.A. 39:10-11 C, and that the Bank had perfected its lien by filing pursuant to the provisions of the Uniform Commercial Code.

After the filing of the opinion the Trustee filed a Petition for Rehearing which was denied. The Trustee now petitions for a Writ of Certiorari.

The Petition for a Writ of Certiorari Should Be Denied

The Court of Appeals stated that the controlling issue in this litigation is whether the five items involved fall within the category of "motor vehicles" as used in the New Jersey Certificate of Ownership Law. The Trustee contends in his Petition that the Court of Appeals decided an important question of New Jersey law in such a way as to conflict with the applicable law of the State.

It is clear that the New Jersey law is in complete accord with the Court of Appeals decision. The Court of Appeals noted that the Certificate of Ownership Law did not contain a definition of "motor vehicle" at the time of the transaction here involved. Accordingly, the definition of "motor vehicle" as used in the comprehensive New Jersey Motor Vehicle Act, N.J.S.A. 39:1-1, becomes of prime importance. The Trustee in his Brief in the Court of Appeals recognized that the definition of "motor vehicle" under N.J.S.A. 39:1-1 was important and stated the question involved as follows:

> "1. Did the District Court err in holding that the chattels in issue are 'motor vehicles' within the intent of N.J.S.A. 39:1-1 and 39:10-21?"

No New Jersey case involving the definition of "motor vehicle" has been found which held that construction equipment is included within the definitional provisions of the Motor Vehicle Act. In fact, in two recent New Jersey Supreme Court decisions decided subsequent to the decision by Judge Seitz herein, the Court expressly stated that the Legislature did not intend construction equipment to be included within the definition of Motor Vehicle as found in N.J.S.A. 39:1-1. See, *National State Bank* v. *Rapp*, 90 N. J. Super. 300, 217 A. 2d 325 (1966), certif. granted 47 N. J. 91, 219 A. 2d 425 (1966), rev. 49 N. J. 457, 231 A. 2d 222 (1967) and *Ferrante Equipment Company* v. *Foley Machinery Co.*, 49 N. J. 432, 231 A. 2d 208 (1967). In the *Ferrante* decision, the Court held (49 N. J. 432, 438, 231 A. 2d 208, 211):

> "As stated above, this decision rests upon whether the bulldozer is a motor vehicle within the contemplation of the Garage Keepers Lien Act. For, if it is a motor vehicle, defendant has only a garage keeper's lien that is inferior to plaintiff's. If it is not a motor vehicle, defendant has an artisan's lien that is superior to plaintiff's. But, no definition of a 'motor vehicle' accompanies the Garage Keepers Lien Act. Under N.J.S.A. 39:1-1 a 'vehicle" is defined to include "every device in, upon or by which a person or property is or may be transported upon a highway.' It also defines a 'motor vehicle' to include 'all vehicles propelled otherwise than by muscular power, excepting such vehicles as run upon rails or tracks.'
>
> "We are convinced that the Legislature meant to include by the term 'motor vehicle' only those self-propelled vehicles which are used on a highway primarily for purposes of transporting persons and property from place to place, e.g., automobiles,

trucks, and buses. As a bulldozer is used primarily for excavation and building purposes and only incidentally to transport persons or property from place to place, it should not be included in such a definition. See, In the Matter of Ferro Contracting Co., Inc., —— F. 2d —— (3 Cir. 1967).

"That a bulldozer is not a motor vehicle within the contemplation of the garageman's lien act is strengthened by administrative interpretation of the motor vehicle certificate of ownership law. N.J.S.A. 39:10-1 et seq."

In both cases the Court went on to expressly hold that bulldozers could not therefore be considered "motor vehicles" within the contemplation of the Garage Keepers Lien Act, N.J.S.A. 2A:44-20 *et seq.*

In addition to these two recent New Jersey Supreme Court decisions, three cases decided by lower New Jersey courts have indicated that construction equipment similar to that involved in this litigation were not intended to fall within the definitional terms of "motor vehicle" as contained in the New Jersey Motor Vehicle Act. Thus, in *Bogota* v. *Brewster Equip. Co.*, 83 N. J. Super. 586, 200 A. 2d 629 (App. Div. 1964), where the plaintiff sought to add as property tax assessables a considerable amount of construction equipment owned by the defendant but not originally included as property subject to the Borough's personal property tax, the Court indicated that "motor vehicle" as used in N.J.S.A. 39:1-1 does not include construction equipment.

Also, in *Wood* v. *Food Fair Stores, Inc.*, 49 N. J. Super. 352, 139 A. 2d 805 (Law Div. 1958), the Court recognized that a "backhoe" or trench digger was not a vehicle which requires registration, does not operate on the highway because of its metal treads, and is moved from job to job on

a flat-top trailer, and in *Wilson* v. *Robert A. Stretch, Inc.*, 44 N. J. Super. 52, 129 A. 2d 599 (Ch. Div. 1957), the Court ruled that a front end loader with one cubic yard bucket and blade was not a "vehicle" for purposes of the Municipal Mechanics Lien Act, N.J.S.A. 2A:44-128.

In view of all these decisions, it is clear that the decision of the Court of Appeals does not conflict in any way with the case law of the State of New Jersey.

While the Petitioner bases much of his agreement upon the Statement annexed to the Amendment to the original Certificate of Ownership Law, this Statement is consistent with the decision below that the Legislature was doing no more than making clear the pre-existing legislative intent as to the scope of the statute. Indeed, the Court of Appeals decision is strengthened by the fact that the statute was drafted by the Chief of the Certificate of Ownership Bureau of New Jersey who testified on behalf of the Bank before the Referee that there had been considerable administrative confusion as to the coverage of the term "motor vehicle" and that the items involved were not the type of equipment generally titled and registered in New Jersey.

It is thus apparent that the Court of Appeals decision in this case is in accord with New Jersey law in all respects. Moreover, while the particular issue is of importance to the parties, this case clearly does not involve a principle of law which raises a question of general public interest or importance. The Amendment to the New Jersey Certificate of Ownership Law passed after this dispute arose provides for "non-conventional type motor vehicles" and has effectively cleared up any question which might have arisen in the future. This Court should not grant a review of a case which involves no general public principle requiring pronouncement.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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